

FILED

FEB 16 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DUNCAN G.J. MARTINEZ,

Petitioner - Appellant,

v.

E. ROE, Warden,

Respondent - Appellee.

No. 04-56704

D.C. No. CV-02-03148-AHM

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
A. Howard Matz, District Judge, Presiding

Submitted February 13, 2006^{**}

Before: FERNANDEZ, RYMER, and BYBEE, Circuit Judges.

California state prisoner Duncan G.J. Martinez appeals pro se from the district court's order dismissing his 28 U.S.C. § 2254 habeas petition as untimely. We have jurisdiction pursuant to 28 U.S.C. § 2253. Reviewing de novo, *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999), we affirm.

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Because the California Supreme Court ultimately denied Martinez’s second round of state post-conviction petitions as untimely, Martinez was not entitled to statutory tolling during the gap between the date the California Superior Court denied his second state habeas petition, and the filing of his section 2254 petition in district court. *See Pace v. DiGuglielmo*, 125 S. Ct. 1807, 1814 (2005) (holding that “[b]ecause the state court rejected petitioner’s [state] petition as untimely, it was not ‘properly filed,’ and [petitioner was] not entitled to statutory tolling under § 2244(d)(2)”); *see also Carey v. Saffold*, 536 U.S. 214, 225-26 (2002) (noting that if the California Supreme Court expressly holds delay was unreasonable, petition is no longer “pending”). Therefore, we agree with the district court that Martinez’s section 2254 petition was untimely filed.

To the extent that Martinez contends that he is entitled to equitable tolling, we disagree. Martinez has not demonstrated extraordinary circumstances beyond his control that made it impossible to file his section 2254 petition on time. *See Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled in part on other grounds, Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998) (en banc).

AFFIRMED.